

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
TSUKAMOTO FAMILY TOURS dba )  
NATURE SCHOOL )  
for a Motor Carrier Certificate )  
or Permit. )  
\_\_\_\_\_)

DOCKET NO. 05-0162

ORDER NO. 22125

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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RECEIVED

Filed November 16, 2005

At 10:00 o'clock A .M.

for Michiru S.U.M. Kau  
Chief Clerk of the Commission

ATTEST: A True Copy  
for KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

Michiru S.U.M. Kau

In the Matter of the Application of)  
TSUKAMOTO FAMILY TOURS dba )  
NATURE SCHOOL )  
for a Motor Carrier Certificate )  
or Permit. )

Order No. 22125

By this Order, the commission denies Jack's Tours, Inc.'s ("Jack's") motion to intervene in the matter of the application of TSUKAMOTO FAMILY TOURS dba NATURE SCHOOL ("Applicant") to extend Certificate No. 5708-C by including the 1-to-7 passenger classification, and deleting the 15-passenger seat limitation in the 8-to-25 passenger classification on the island of Hawaii, excluding Waipio Valley. The commission also dismisses Applicant's motion to strike the motion to intervene.

By application filed on June 30, 2005, Applicant requested approval from the commission to extend its certificate of public convenience and necessity no. 5708-C ("CPCN"), by including the 1-to-7 passenger classification and deleting the fifteen-passenger seat limitation in the 8-to-25 passenger

classification, on the island of Hawaii, excluding Waipio Valley ("Application").

B.

Motion to Intervene

On August 24, 2005, Jack's filed a Motion to Intervene in this proceeding ("Motion to Intervene"). According to the Motion to Intervene, Jack's is a "duly certificated common carrier by motor vehicle in the 1 to 7, 8 to 25, and over-25 passenger categories on the island of Hawaii, excluding Waipio Valley." Jack's sought intervention on the grounds that: 1) the services proposed to be rendered by Applicant are already provided by Jack's; 2) Applicant fails to provide "reliable evidence" to support its claim "that extended service as a common carrier are necessary because 'there are only a few, if any, tour operators who actually understand the needs and desires of Japanese visitors'"; 3) Applicant's letters of support do not support its request for extension of its CPCN; 4) "[Jack's] and the other currently licensed motor carriers on the island of Hawaii have more than sufficient vehicle capacity to serve the present and future public need"; 5) "[d]espite the more than sufficient capacity of authorized motor carriers, in the past year, the PUC has authorized numerous carriers to enter the market or expand their authorities on the island of Hawaii"; 6) the September 11, 2001 terrorist attacks, the war in Iraq, and the SARS epidemic "demonstrate the need for the Commission to avoid further economic harm to the authorized motor carriers

through the unnecessary entry of additional motor carriers at this time"; 7) Applicant is unable to comply with commission limitations on its CPCN, as evidenced by Jack's' allegation that it had observed Applicant violating its passenger seating limitation; 8) "[e]xcept for the investigation of this application by the Commission's staff there are no other means available whereby the interests of Jack's Tours may be protected"; 9) "[Jack's] participation will not broaden the issues or unduly delay this proceeding"; and 10) "[Jack's] interest in this proceeding differs from that of the general public because, if the application filed herein is granted, Applicant will be in direct competition with [Jack's]."<sup>1</sup>

In its Motion to Intervene, Jack's requested oral argument should the commission be inclined to deny its Motion. By Notice of Hearing filed on September 2, 2005, the commission notified Applicant and Jack's that oral argument on the Motion to Intervene was scheduled for October 13, 2005, at 1:00 p.m., in the commission's hearing room.

No written response to the Motion to Intervene was filed by the Applicant.

C.

#### Motion to Strike

Instead, on October 3, 2005, over a month after the Motion to Intervene was served, Applicant filed a Motion to Strike Motion to Intervene ("Motion to Strike") arguing that

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<sup>1</sup>Motion to Intervene at 2-8.

Jack's Motion to Intervene was "Jack's latest attempt in a long line of frivolous motions for intervention in proceedings for applications for motor carrier certificates."<sup>2</sup> Applicant argued that the Motion to Intervene contravenes the commission's policy of "fostering sound economic conditions in transportation without committing 'undue preference or advantage, or unfair or destructive competition.'"<sup>3</sup> Applicant also argued that the Motion to Intervene violates Hawaii Administrative Rules ("HAR") § 6-61-55, which governs the requirements for motions to intervene. Applicant did not request a hearing on its Motion to Strike.

On October 10, 2005, Jack's filed a Memorandum in Opposition to the Motion to Strike in which it argued that the Motion to Strike was untimely, and that its Motion to Intervene complied with the requirements of HAR § 6-61-55.

D.

Hearing on the Motion to Intervene

On October 13, 2005, the commission heard oral argument only on the Motion to Intervene. Timothy Lui-Kwan, Esq. and Elyze McDonald, Esq., appeared on behalf of Applicant. Wray H. Kondo, Esq. appeared on behalf of Jack's. Also present was Jeff Miyashiro, President of JT Holding, which owns Jack's.

At the hearing on the Motion to Intervene, Jack's reiterated some of the assertions it made in its Motion arguing

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<sup>2</sup>Motion to Strike at 1.

<sup>3</sup>Id. at 5.

that Applicant's history of unauthorized operation "calls into question the Applicant's overall fitness and ability."<sup>4</sup> Jack's also asserted that Applicant takes a position tantamount to deregulation of the motor carrier industry, i.e., not allowing Jack's to intervene in the instant proceeding while the commission authorizes numerous motor carriers to enter the market without regard to what Jack's asserts is a "sufficient capacity of authorized motor carriers."<sup>5</sup>

In response, Applicant argued that Jack's "has been abusing the intervention process" and that "the PUC is tasked with the policy of fostering sound economic conditions without giving unfair advantage or preference or promoting unfair or destructive competition practices."<sup>6</sup> According to Applicant: "Allowing Jack's to somehow impact a competitor's business means that the PUC would be giving unfair preference or advantage to Jack's."<sup>7</sup> With regard to the allegation that Applicant violated commission rules, Applicant asserted that no finding of a violation was ever made by the commission.<sup>8</sup>

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<sup>4</sup>Transcript of Proceeding at 47-48.

<sup>5</sup>Id. at 50-51.

<sup>6</sup>Id. at 49.

<sup>7</sup>Id. at 49.

<sup>8</sup>Id. at 52.

## II.

### Discussion

#### A.

#### Motion to Strike

Although characterized as a motion to strike, it is apparent to the commission that Applicant's Motion to Strike, which was directed to the substantive arguments made in the Motion to Intervene, was, in fact, intended to be a written response to the Motion to Intervene. The Motion to Strike, however, was untimely under HAR § 6-61-41(c), and accordingly, is dismissed.

HAR § 6-61-41(c) states:

(c) An opposing party may serve and file counter affidavits and a written statement of reasons in opposition to the motion and of the authorities relied upon not later than five days after being served the motion, or, if the hearing on the motion will occur less than five days after the motion is served, at least forty-eight hours before the time set for hearing, unless otherwise ordered by the chairperson.

HAR § 6-61-41(c). As such, under HAR § 6-61-41(c), Applicant was required to file any opposition to the Motion to Intervene within five (5) days of service of the Motion.

Here, Jack's filed the Motion to Intervene on August 24, 2005. The Motion was apparently served by certified mail, return receipt requested on the date of filing, August 24, 2005, thus pursuant to HAR § 6-61-21, two (2) additional days shall be added to the prescribed five (5) days. The Motion to Strike, which argues that the Motion to Intervene should be denied, was filed on October 3, 2005, over a month after the

deadline to file an opposition to the Motion to Intervene. Notably, the Motion to Strike was not accompanied by any motion to enlarge the time in which to file an opposition to the Motion to Intervene. The commission, thus, finds that the Motion to Strike was untimely, pursuant to HAR § 6-61-41(c), and dismisses Applicant's Motion to Strike.

B.

Motion to Intervene

It is well established that intervention as a party in a commission proceeding "is not a matter of right but is a matter resting within the sound discretion of the commission." See In re Application of Hawaiian Elec. Co., Ltd., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975). See also In re Paradise Merger Sub, Inc., et al., Docket No. 04-0140, Order No. 21226 (August 6, 2004).

HAR § 6-61-55 sets forth the requirements for intervention. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.
- (b) The motion shall make reference to:
  - (1) The nature of the applicant's statutory or other right to participate in the hearing;
  - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;



- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;
- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b). Section 6-61-55(d), however, states that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." (Emphasis added.)

After reviewing the entire record including Jack's written submission and oral argument, the commission finds that Jack's allegations are not reasonably pertinent to the resolution of the Application and that intervention by Jack's would unreasonably broaden the issues already presented. While it is apparent that Jack's may have a financial interest in preventing unwanted competition, its claim that its sizeable business operations will be harmed over time by the cumulative effect of several small motor carrier operators like the Applicant, is purely speculative. Jack's, moreover, has other means by which to protect its market share. Jack's, for example, could offer

better service than its competitors or more competitive pricing. See In re Robert's Tours & Transp., Inc., 104 Hawaii 98, 109, 85 P.3d 623, 634 (Haw. 2004) (affirming the commission's decision to grant a motor carrier authority to operate where "it would encourage competition and constrain otherwise monopolistic operations"). Jack's participation as an intervenor, moreover, is only likely to delay the proceeding and will not assist the commission in developing a sound record.

For the foregoing reasons, we conclude that Jack's Motion to Intervene should be denied.

### III.

#### Order

#### THE COMMISSION ORDERS:

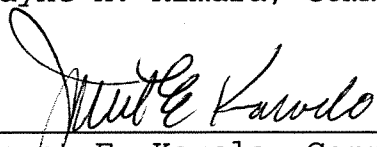
1. Jack's Motion to Intervene, filed on August 24, 2005, is denied.
2. Applicant's Motion to Strike, filed on October 3, 2005, is dismissed.
3. Applicant's request for reimbursement for the cost and fees related to bringing its Motion to Strike is denied.

DONE at Honolulu, Hawaii November 16, 2005.


PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By (EXCUSED)  
Wayne H. Kimura, Commissioner

By   
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

  
Benedyne S. Stone  
Commission Counsel

05-0162.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22125 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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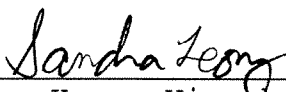
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for Karen Higashi

DATED: November 16, 2005